



## Protecting Access to High-Quality Maternity Care

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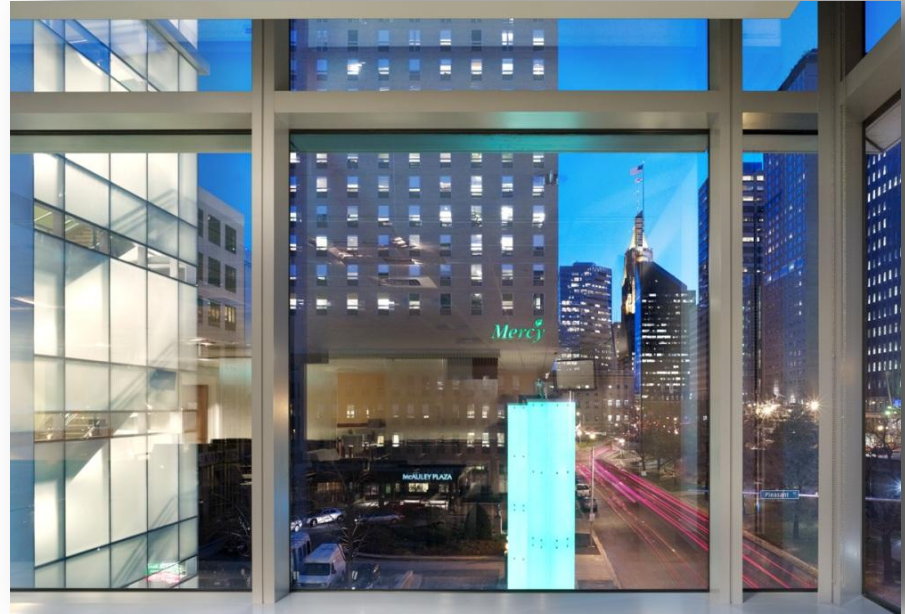
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# Mercy Medical Center Background

- ❑ Founded in 1874 in Downtown Baltimore.
- ❑ High-quality, Independent Community Hospital affiliated with the University of Maryland School of Medicine.
- ❑ Mission-driven health system sponsored by the Sisters of Mercy.
- ❑ \$49 Million in uncompensated care in FY2013.
- ❑ Clinical Staff support of Healthcare for the Homeless.
- ❑ Sexual Assault Forensic Examination Program (SAFE).



## Facts: Mercy's Community Benefit Service Area

- ❑ 187,714 population (represents 30% of all City residents)
- ❑ More than 21% of households are below the federal poverty level
- ❑ 67% minority

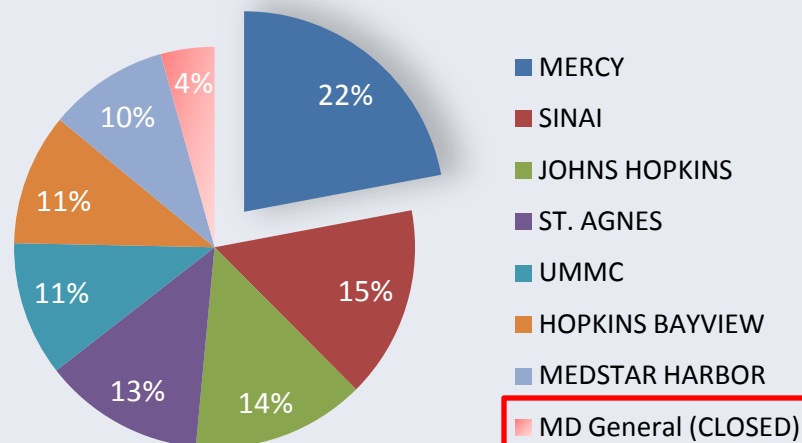


# Mission: Baltimore City's Largest Birthing Hospital



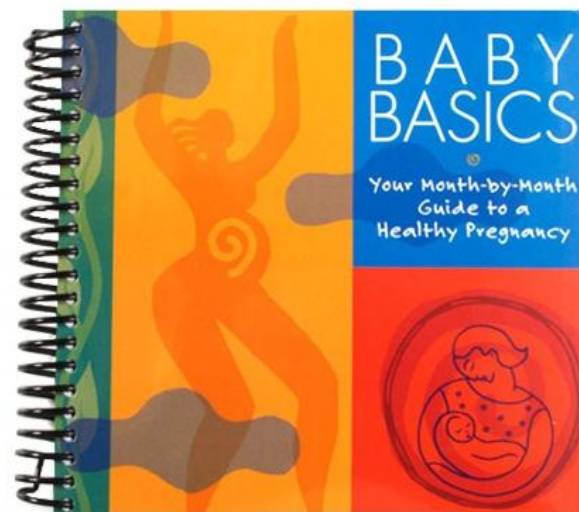
*Dr. Robert Atlas, Chair, Department of Obstetrics and Gynecology talks with a Mercy patient.*

## Baltimore City Deliveries



\*FY2013 Deliveries

- ☐ About 22% of all city births.
- ☐ More than 65% are Medicaid-insured patients.
- ☐ FQHC Coordination and Provider Staffing.
- ☐ Increasing maternal health literacy (Baby Basics).
- ☐ Maryland achieved significant reduction in infant mortality—especially among African Americans.



# Timeline of a looming crisis

- ❑ Independent Bond Rating agencies (S&P and Moody's) have begun citing birth injury jury awards in recent Hospital rating reports:
  - ***“Recent large legal settlements against healthcare providers in Baltimore resulted in a more challenging litigious environment.”***

June 2012: **\$55 million** judgment in a birth injury case against The Johns Hopkins Hospital.

July 2012: **\$21 million** jury award to a Glen Burnie couple whose son was born prematurely at Harbor Hospital.

May 2013: **\$16 million** jury award in a birth injury case against Prince George's Hospital Center.

July 2013: Maryland General Hospital **closed** its 100-year old obstetrics program as a result of “financial pressures”.

December 2013: Maryland Hospital Association statewide industry survey shows doubling (**+108% increase**) of cost to settle a birth injury claim since 2009.

2014: Maryland Medical Liability climate given **“F” grade** by the American College of Emergency Physicians.

- ***“Maryland would benefit most from reforms aimed at lowering the state's high medical liability insurance rates and malpractice awards.”—2014 ACEP Report***



# The Philadelphia Lesson

❑ Maryland's growing maternity access crisis mirrors similar events in Pennsylvania.

❑ In little more than a decade:

**21 Philadelphia-area birthing hospitals have permanently shut down their obstetrics programs.**

❑ In the Philadelphia region, the effects of the crisis have been severe—including increased travel distances for urban patients relying on public transportation and financial assistance.

❑ 5 of Philadelphia's 6 birthing hospitals are above their preferred capacity.



**Mostly Academic Medical Centers Remain in OB business:**

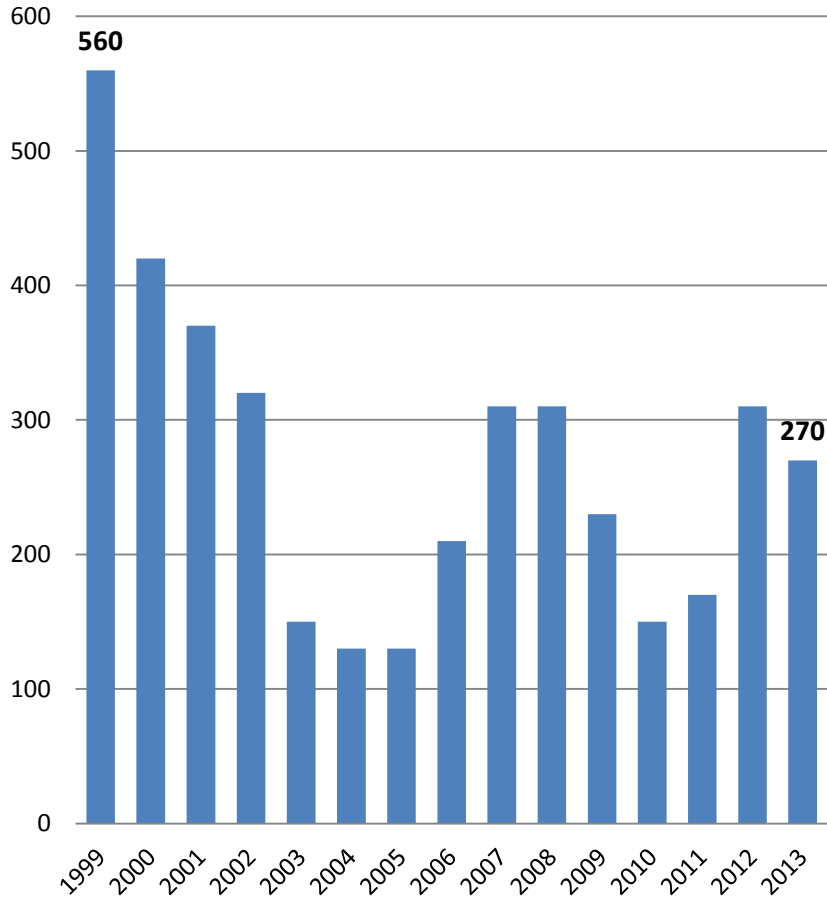
- Temple University Hospital
- Thomas Jefferson University Hospital
- Hahnemann University Hospital
- Hospital of the University of Pennsylvania
- Einstein Medical Center

SOURCE: Philadelphia Business Journal 3-part Investigative Series: **Labor Pains: Contraction in the Baby Business** sponsored by the Commonwealth Fund:  
<http://www.commonwealthfund.org/grants-and-fellowships/fellowships/association-of-health-care-journalists-reporting-fellowships-on-health-care-performance/2011-2012/john-george>



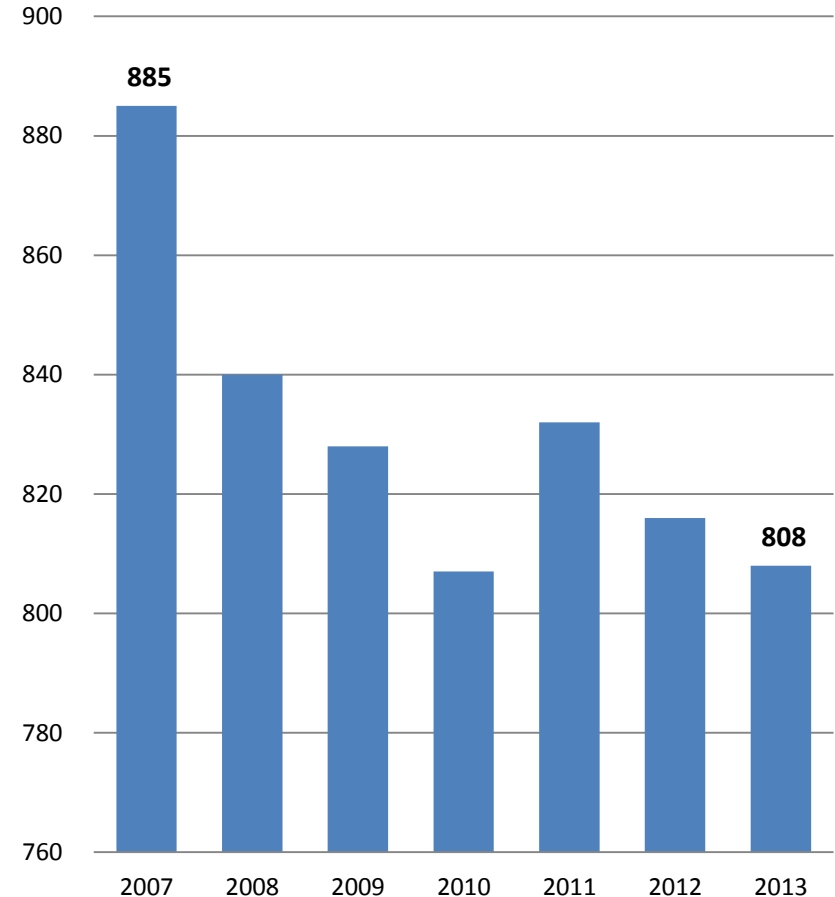
# Impact on Maryland OB Physician Supply Remains Unclear But Trends Are Negative

Number of Employed OBGYN Physicians in Maryland



**SOURCE:** U.S. Dept. Of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, Obstetricians and Gynecologists: Physicians who provide medical care related to pregnancy or childbirth and those who diagnose, treat, and help prevent diseases of women, particularly those affecting the reproductive system. May also provide general medical care to women. **\*Estimates do not include self-employed workers.** <http://www.bls.gov/oes/current/oes291064.htm>

Number of Physicians delivering babies in Maryland



**SOURCE:** The St. Paul Group, Market Share Analyst, Non-Confidential Abstract Data. Data represents number of unique physicians, nurse practitioners, and nurse midwives attributed to births in Maryland hospitals. <http://www.thestpaulgroup.com/>

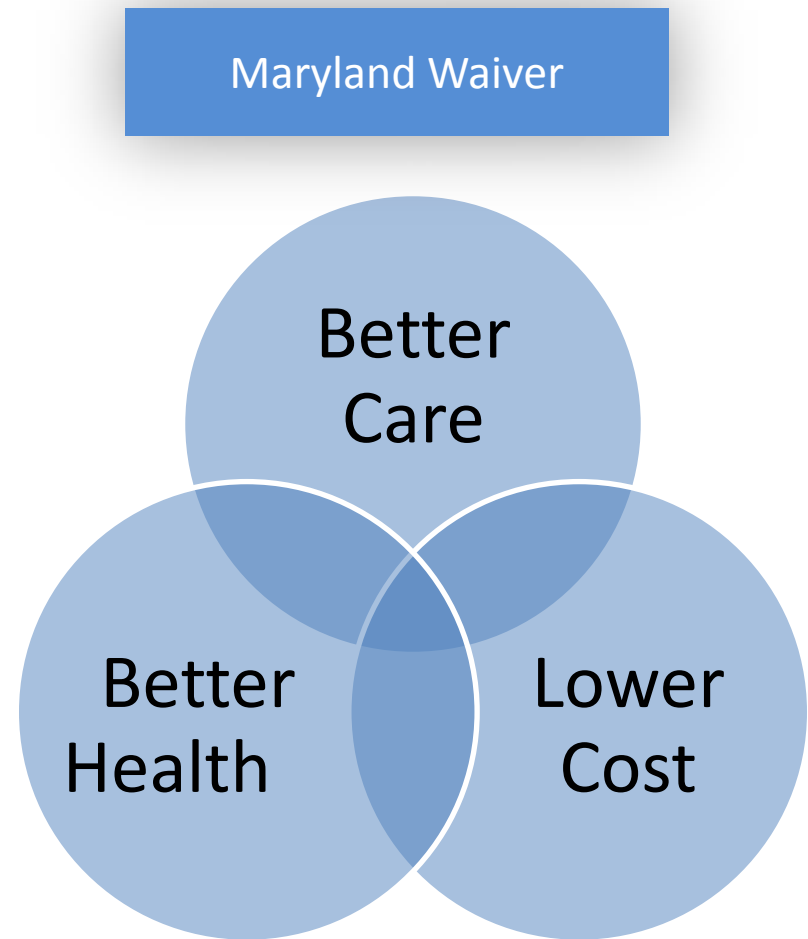




# Medical Liability Costs in the context of the Maryland Medicare Waiver

- ❑ New Waiver requires Maryland to limit its annual all-payer per capita total hospital cost growth to 3.58%
- ❑ Nationally, overall annual medical liability system costs, including defensive medicine, are estimated to be \$55.6 billion (2008 dollars), or 2.4% of total health care spending.\*
- ❑ "The incentives in the current medical malpractice system can run counter to the key cost containment goals in [the waiver]. The current malpractice system encourages health care providers to increase utilization...
- ❑ "...[the waiver] **could be supported by reforms in the medical malpractice system**...reforms should go beyond the caps on awards for pain and suffering... to address more fundamental restructuring of the medical malpractice system."

—*Final report of the HSCRC Advisory Council, January 31, 2014.*



\*National Costs Of The Medical Liability System: M. Mello, A. Chandra, A. Gawande, D. Studdert. Health Affairs, 2010 September  
<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3048809/pdf/nihms269333.pdf>



# A Targeted and Innovative Solution

- ❑ A **“No-fault” Birth Injury Fund**—if well-crafted and executed—is a promising solution to the problem we face in Maryland.
- ❑ The purpose of a Maryland birth-related neurological injury compensation program is to **sustain access** to quality obstetrics care for Maryland women by:
  - **Reducing risk for women’s health care providers**, enabling them to continue to meet community needs.
  - **Stabilizing medical malpractice-related costs** to help Maryland attract and retain good doctors and control increasing health care costs.
  - **All while providing fair and equitable compensation** to meet the long-term special needs of infants who have suffered major birth-related neurological injuries.
- ❑ Creates a unique process—out of the court system—to address birth injuries, the most severe and costly types of medical injuries.
- ❑ Targeted solution (carve-out), not wholesale changes to tort law, not pursuing the old debate on “caps”.
- ❑ Current system is a lottery of injustice that does a poor job of both assigning blame and equitably compensating the injured.
- ❑ Administrative system similar to state-based workers’ compensation systems.





# Core benefits of no-fault birth injury programs

- ❑ A Maryland program could be based on a “no-fault” system of compensation.
  - Based on Florida (<http://www.nica.com>) and Virginia (<http://www.vabirthinjury.com>) models
- ❑ Acceptance into the program is not based on a finding of malpractice but rather that the claimant has met a legal definition a birth-related neurological injury.
- ❑ *Under this model:*
  - **More Maryland children who suffer birth injuries will receive the lifetime care they need.**
  - **Children/Families will have greater certainty** and immediate access to lifetime special care—rather than going through unpredictable, costly and painful process of litigation which can also result in no compensation at all.
  - Doctors and Hospitals prospectively avoid litigation related to all birth injuries that meet the eligibility definition.
- ❑ While the current system impedes Maryland’s progress towards meeting the three key objectives of Maryland Waiver & health care reform, this program supports:
  - **Improving patient care**
  - **Improving community health**
  - **Reducing costs**



Welcome to the website of one of the most innovative programs in the United States. Designed to assure access to obstetrical services for all Commonwealth residents, the Virginia Birth-Related Neurological Injury Compensation Program also has distinguished itself by assuring superior care for admitted children.



A Lifetime Of Care



# What national experts say about Birth Injury Funds

**Both Florida's (1988) and Virginia's (1986) birth injury programs have long track records to evaluate program effectiveness:**

- ❑ A study of Florida's program concluded that the program **"receives passing, if not exemplary, marks...** Compensation of injuries is comparable to that under tort law. Administrative costs are much lower. The program has withstood legal challenges and has been self-sufficient and fiscally stable since its inception." - J Horwitz and T A Brennan, [No-fault compensation for medical injury: a case study](#), *Health Affairs*, 14, no.4 (1995)
- ❑ A Virginia General Assembly Joint Legislative and Review Commission reported that Virginia's program had a **"positive effect on claims costs, and subsequent malpractice premiums."** - [Review of the Virginia Birth-Related Neurological Injury Compensation Program](#), Joint Legislative Audit and Review Commission, November 12, 2002.
- ❑ A study of both programs states: "...The academic evaluations, together with more recent official investigations, have found that **the programs have largely achieved their principal objectives—namely, acting as a stabilizing influence on the obstetrics tort environment, improving efficiency and speed of adjudication of claims, and responding to the needs of injured children and their families.** Specifically, the reports found that, relative to the tort system, the programs have shortened the time from claim filing to compensation and lowered overhead costs and attorneys' fees. They have also had high rates of physician participation and have decreased the number of high-cost malpractice claims brought in tort. Finally, they have resulted in lower malpractice insurance premiums for obstetrician-gynecologists, even those who do not participate in the programs." -[Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation](#), G. Siegal, M. Mello, and D. Studdert, 34 *American Journal of Law & Medicine* 493 (2008).



***"Florida and Virginia have operated birth injury funds for nearly a quarter-century, and though not perfect, they have done a commendable job of balancing the needs of health care providers and patients."***

*-Michelle Mello, JD. PhD.  
Professor of Law and Public Health, Harvard School of Public Health writing for **The New York Times**, July 11, 2009.*

\*M. Mello joins the faculty of Stanford Law School this summer.



# The New York State Medical Indemnity Fund

- ❑ Better than Maryland but falls short of Florida & Virginia programs in several ways.
- ❑ Enacted in 2011, limited time to evaluate program
- ❑ Based on a “birth-related neurological injury” definition similar to Florida and Virginia
- ❑ But remains a **fault-based system**, despite clear evidence showing that birth injuries can occur even under the best medical care.
- ❑ Cases remain in Tort System:
  - No reduction in funds to pay attorney’s fees.
  - No reduction in legal defense costs.
  - Longer wait times before patients and families receive any compensation or care for injuries—just like tort.
  - Families must endure trials and can lose a recovery based on a finding of no negligence.
- ❑ The Fund is currently financed through a budget allocation from the state of New York and is indirectly funded by *“a quality contribution ... imposed on the inpatient revenue of each general hospital that is received for the provision of inpatient obstetrical patient care services in an amount equal to 1.6% of such revenue, as defined in § 2807-d(3)(a) of the Public Health Law.”*

DAMAGES	NEW LAW	OLD LAW
Pain and Suffering	\$4,000,000	\$4,000,000
Past Medical Expenses	\$3,000,000	\$3,000,000
Future Medical Expenses	Paid By Fund	\$10,000,000
Lost Earnings	\$3,000,000	\$3,000,000
Plaintiff's Attorney Fee (Judiciary Law §474-a)	\$2,150,000 (50% Paid To Attorney By Plaintiff Out of Non-Fund Portion of Award; 50% Paid to Attorney By Defendant)	\$2,150,000
<u>Total Liability of Defendant</u>	\$11,075,000 (Plaintiff Receives Total of \$8,925,000)	\$20,000,000

Illustrative Chart based on a hypothetical \$20 million judgment in which 50% of the damages are for future medical expenses and 50% are for “non-Fund” items of damages

**SOURCE:** Illustrative chart from the New York based law firm of Heidell, Pittoni, Murphy & Bach, LLP, communication to clients : <http://www.hpmb.com/email/110414/>



# ***What would a Maryland Birth Injury Fund Bill look like?***

- ❑ SB798/HB1337 Provisions largely based on best practice provisions that are currently in place in Florida, Virginia adapted to comport with Maryland law.
- ❑ Partner hospitals have funded an independent actuarial analysis to determine the expected cost of the program and better understand the cost/benefit for Hospitals and Doctors.
- ❑ Reached out to independent national experts to solicit their support in further refining key provisions.
- ❑ A Maryland program—if crafted properly by learning from best practices—could become an even stronger program and a national model for reasonable medical liability reform.
- ❑ **SB798/HB1337 introduced in the 2014 Maryland General Assembly Session with 32 co-sponsors.**



Photo: Woodrow Wilson Bridge—Each day more than 100,000 Maryland residents cross the Potomac river commuting to Virginia to work and visa versa. On one side of the river, injured babies are covered by a no-fault birth injury fund, on the other side, families can only sue doctors and hospitals for compensation in an inequitable, fault-based tort system.





# Key Provisions: Definition

**In order to create the scope of a compensation program and define its beneficiaries, a legal definition must be created for what constitutes a birth-related neurological injury.**

FLORIDA LAW	VIRGINIA LAW	MARYLAND LEGISLATION
<p>"Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. Fla. Stat. §766.302(2)</p>	<p>"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation necessitated by a deprivation of oxygen or mechanical injury that occurred in the course of labor or delivery, in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. Va. Code Ann. §38.2-5001</p>	<p>"Birth-related neurological injury" means: an injury to the brain or spinal cord of a live infant; caused by oxygen deprivation or mechanical injury which occurred or could have occurred during prodromal labor or labor, during delivery, or in the immediate resuscitative period after delivery; and renders the infant permanently and substantially mentally and physically impaired, and such disability causes the infant to be permanently in need of assistance in at least two of the following activities of daily living: bathing; getting dressed or changing clothes; eating, nutritional planning, and preparation of meals; toileting; and mobility, including transferring to and from a bed, chair or other structure, and moving about indoors or outdoors. "Birth-related neurological injury" includes only injuries involving obstetrical services provided in a Maryland hospital. Birth-related neurological injury" does not include disability or death caused by genetic or congenital abnormality.</p>

*(Note: The Maryland definition seeks to provide additional guidance to the administrative law judges on the meaning of "permanently in need of assistance in all activities of daily living" (ADL) used in the Virginia statute by using definitional concepts of ADLs in current Maryland statutes and regulations. The definition of Activities of Daily Living (ADLs) is derived and modified from several Maryland statutory and regulatory references, including §8-601 of the Insurance Article, §19-4B-01 of the Health General Article.)*



## Key Provisions: Eligibility

- ❑ In order to be eligible for the program, the birth must have been performed in a hospital and must also meet the above definition of a birth injury.
- ❑ Eligibility is determined by an Administrative Law Judge, specifically assigned to review birth injury cases within the Maryland Office of Administrative Hearings.
- ❑ The claimant may appeal eligibility determinations in accordance with Maryland Administrative Procedures Act.





# Key Provisions: Benefits

If the ALJ rules that the claimant is eligible, the claimant could receive the following benefits under the program:

- Lifetime medical, hospital, rehabilitation/therapy, nursing, residential and custodial care; (Average lifetime value of approximately \$3.5-4 million\*)
- Compensation for lost earnings, ages 18 to 65, paid in disbursements;
- An immediate one-time award of up to \$100,000;
- Reasonable claim filing costs (including attorney's fees).

\* Source: Pinnacle Actuarial Resources report on Maryland No-Fault Birth Injury Fund, February 16, 2014.



# Key Provisions: Liability/Disclosure

- ❑ **Exclusive Remedy:** If injury falls within the statutory eligibility criteria for the birth injury program, the opportunity for tort litigation is foreclosed. Claimants may appeal eligibility determinations.
- ❑ **Disclosure:** Provisions would include requirements that the Birth Injury Fund must provide program materials for patients through hospitals that explain rights under the program and ways in which the program limits patients' rights.



# Key Provisions: Fiscal Safeguards

- ☐ Board of Trustees appointed by the Governor.
  - Board Structure similar to Maryland Injured Worker Insurance Fund & Maryland Automobile Insurance Fund.
- ☐ Independent and publicly disclosed annual financial audits.
- ☐ Independent and publicly disclosed annual actuarial analysis on assets and projected liabilities.
- ☐ Investment policies same as regulated Maryland Insurance companies.
- ☐ The debts and obligations of the Fund are not debt of the State or a pledge of credit of the State
- ☐ Board has statutory authority to increase premium rates based on annual Actuarially Required Contribution, within limits.



# Key Provisions:

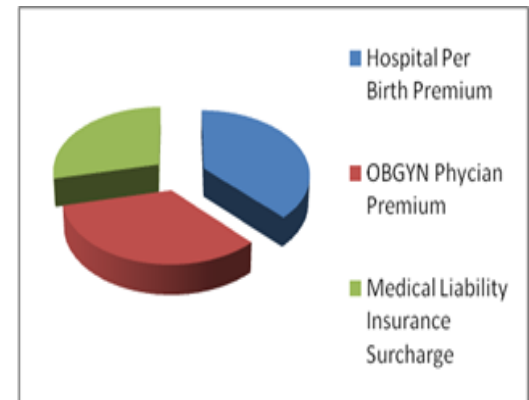
## Case Review & Prevention

- ☐ Each case is sent to the Maryland Health Department for review of any “substandard” care by the hospital.
- ☐ Each case is sent to the Maryland Board of Physicians for review of any “substandard” care by the physician.
- ☐ Both entities could use existing regulatory powers to promote accountability.
- ☐ The legislation includes provisions that advance overall prevention of birth-related injuries in Maryland.

# Expected Costs & Suggested Funding

**Cost/Funding recommendations from Pinnacle**, the nation's leading independent actuarial expert on Birth Injury Funds:

- ❑ **\$22.8 Million expected benefit costs** (central)
- ❑ Like Florida and Virginia, actuary recommended funding based on:
  - Hospital delivery volume/obstetrics revenue. For example, a \$150/\$175 per birth premium, with an appropriate minimums/maximums (3000 births).
  - \$7,500 annual premium from OB physicians. (In Virginia, MedMutual, others provide a “credit” discount averaging \$10,000-\$20,000 for participating in Birth Injury Program).
  - Premium surcharge on Maryland Medical liability coverages.
  - Hospital costs effectively funded through HSCRC rates-- accounting for less than \$10 million within a \$585 million (FY2014) overall rate increase for the system while providing substantial medical liability cost relief to hospitals and hospitals self-insurance programs, thereby positioning hospitals to better contain future costs under the waiver.



Note: Administrative costs of the program, funded by hospitals, physicians, medical liability insurers, estimated by Pinnacle, are \$750,000 annually, consistent with Florida and Virginia experiences. Maryland Department of Legislative Services estimates State General fund expenditures would increase by \$1 million, which accounts for staff for the Perinatal Clinical Advisory Committee (PCAC), two administrative law judges to adjudicate claims, and Medicaid costs due to increased rates for obstetrics services.



# Independent Actuarial Report: Additional Findings

- ❑ “Based on available information from [Florida & Virginia programs], we estimate that the frequency of qualifying claims would be between 0.9 and 1.0 claims per 10,000 live births.
  - **Based on this assumption, we estimate that a total of about 7 qualifying births occur in Maryland annually.**
- ❑ “Similarly, a review of Florida and Virginia benefits payments and unpaid benefits estimates suggests that lifetime claims benefits in Maryland for benefits similar to those in the Virginia and Florida birth funds would have a present value of between \$3.1 million and \$3.5 million.
- ❑ Medical Liability Mutual Insurance Society of Maryland premium discount to OB/GYNs that participate in the Virginia Birth Fund is currently 17%.
- ❑ The Maryland Legislation "funding mechanisms are a valid approach to fully funding the proposed Maryland birth fund's expected benefits."





# Birth Injury Fund is Constitutional

- ❑ **The Maryland Court of Appeals consistently has held the existing cap on non-economic damages is valid, analyzing the restriction under the “rational basis” standard.** Murphy v. Edmonds, 325 Md. 342 (1990). The Birth Injury Fund would be analyzed under the same standard and also will be valid.
- ❑ **Courts in Florida and Virginia have upheld the constitutionality of similar birth injury funds.** Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943 (Fla. 1992); King v. Virginia Birth-Related Neurological Injury Compensation Program, 242 Va. 404, 410 S.E. 2d 656 (Va. 1991).
- ❑ While the Supreme Court of Florida recently held that a portion of the State’s cap on non-economic damages applicable to traditional medical malpractice claims to be unconstitutional under the state constitution;
  - **the Court explained that the birth injury fund is not vulnerable to the same challenge because it is a “no-fault” compensation program.** Estate of McCall v. United States, 134 So. 3d 894 (2014).



# Summary of Adjudication Process Under the Birth Injury Fund Legislation SB798/HB1337

Process begins with filing of a claim with the Birth Injury Fund

Within 10 days, the claimant must provide additional information, including relevant medical records, assessments, documentation of expenses, and documentation of sources of payment.

The Fund investigates the claim and makes a response within 90 days. Within 10 days after the Fund's response is served, the Fund submits all materials to the State Office of Administrative Hearings (OAH).

The OAH must set a hearing date no sooner than 60 days and no later than 120 days after the submission of the claim from the Fund.

The decision by the OAH is appealable to the Circuit Court pursuant to the State Administrative Procedures Act.

**SOURCE:** Maryland Department of Legislative Services, Fiscal & Policy Note on SB798/HB1337: [http://mgaleg.maryland.gov/2014RS/fnotes/bil\\_0008/sb0798.pdf](http://mgaleg.maryland.gov/2014RS/fnotes/bil_0008/sb0798.pdf)

# Thanks to our national experts for joining our discussion...



## Brief Remarks from

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